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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1719

LAMAR LIFE BROADCASTING COMPANY,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, CHANNEL 3, INC., CIVIC COMMUNICATIONS CORP., COMMUNICATIONS IMPROVEMENT, INC., DIXIE NATIONAL BROADCASTING CORP., JACKSON TELEVISION, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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STATEMENT

This Supplemental Brief is submitted by Petitioner, Lamar Life Broadcasting Company, (hereinafter "Lamar"), pursuant to the authority of Rule 24(5) of this Court. Its purpose is to bring to the Court's attention a Memorandum Opinion and Order of the Respondent, Federal Communications Commission, (hereinafter "Commission"), released on May 21, 1971, three days after the filing of the Petition for a Writ of Certiorari herein, which purports to enforce the prior Orders of the Commission here on review even though the mandate of the Court of Appeals in this cause has been stayed pending

certiorari. For the reasons to follow, it is respectfully requested that this Court's review on certiorari include review of the Commission's Order of May 21, 1971.

As was detailed in Lamar's Petition for Writ of Certiorari, (Statement, pp. 3-7), the Commission's Order of September 8, 1970, here under review, directed Lamar to cease operating its television station, WLBT (TV), Jackson, Mississippi, and granted interim operating authority to Respondent, Communications Improvement, Inc., (hereinafter "CII"), pending a comparative hearing now underway at the Commission to choose a permanent licensee. The effectiveness of said Order was stayed by the Commission until thirty (30) days after the Court of Appeals acted upon Lamar's motion for stay pending appeal in that Court.

The Court of Appeals deferred action on Lamar's motion for stay until it acted on the merits of the appeal on March 17, 1971, at which time it also dismissed the stay motion as moot. The effectiveness of the Commission's Order of September 8, 1970, was thus stayed until action by the Court on the merits of the appeal, thereby preserving the *status quo*. Following the filing by Lamar of a Petition for Rehearing and Suggestion for Rehearing En Banc, which automatically stayed the Court's mandate until seven (7) days after denial of said Petition by the Court (Rule 40, Federal Rules of Appellate Procedure), Lamar filed a timely motion for stay of the mandate of the Court below, pending action by this Court on a petition for a writ of certiorari.

On May 14, 1971, the Court of Appeals granted Lamar's motion for stay of mandate pending review by this Court (see Appendix to Petition for a Writ of Certiorari, p. 45). The mandate was stayed to May 30, 1971, subject to

the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure. Four days following the grant of stay of mandate, to-wit, on May 18, 1971, Lamar filed its Petition for a Writ of Certiorari in this Court, thereby continuing the effectiveness of the stay of mandate until disposition of the Petition for Writ of Certiorari. (Rule 41 (b), *supra*).

Thus, as of May 20, 1971, the *status quo* in this matter had been properly preserved. However, on May 21, 1971, in the face of the stay of mandate, the Commission issued a Memorandum Opinion and Order, (a copy of which is printed in the Appendix hereto, p. 1), which dramatically altered the *status quo*. The Order directed CII to file an application for license, request for program test authority and call sign, and an appropriate loan agreement implementing its financial ability to commence operating WLBT. Upon the filing of such documents by CII, a ten (10) day period was to commence during which CII and Lamar were to negotiate a lease agreement with respect to CII's operation of Lamar's physical facilities. Upon execution of the agreement, CII was to commence operating.

The Commission's Order of May 21, 1971, further directs that Lamar deposit "in escrow" all profits earned *by Lamar* from its operation of WLBT from April 17, 1971[1] to the date of the execution of the lease agreement with CII, at which time the said profits so held in escrow are to be turned over forthwith to CII for distribution by it to third parties, namely, educational interests in Mississippi.

On May 26, 1971, CII filed the documents called for by the Commission's Order of May 21, 1971. Thereafter, on

[1] April 17, 1971 is the date upon which the Commission considers its stay to have expired, i.e., thirty (30) days after action by the Court of Appeals on Lamar's motion for stay in that Court.

May 28, 1971, the Commission directed a letter to CII advising it that its documents complied with the Commission's Order and providing that:

> ". . . Accordingly, the ten-day period permitted by the Order within which to reach an agreement as to the transfer of operation of station WLBT(TV) from Lamar Life Broadcasting Company to you expires at 3:00 a.m., June 7, 1971 . . ."[2]

In the meantime, on May 26, 1971, Lamar filed with the Court below a motion for clarification of its order staying the mandate to indicate that its stay was intended to preserve the *status quo* until final disposition by this Court of Lamar's Petition for a Writ of Certiorari or, in the alternative, to stay the effectiveness of the Commission's Order of May 21, 1971, pending this Court's action on certiorari.

The Court of Appeals issued an Order on June 4, 1971, (a copy of which is printed in the Appendix hereto, p. 9), which denied Lamar's motion for clarification and declared that the Court "considers there to be no stay on the transfer of operating authority for the station currently in effect." An Application for Stay of the enforcement of the Commission's Orders of September 8, 1970 and May 21, 1971 was thereafter filed in this Court on June 4, 1971 and is presently pending.[3]

In view of the extraordinary character of the Commission's Order of May 21, 1971, Lamar respectfully urges

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[2] A copy of the Commission's letter of May 28, 1971, is printed in the Appendix hereto, p. 8.

[3] On the same date, June 4, 1971, the Commission granted a one-week extension of the effective date of the turnover to 3:00 a.m., June 14, 1971.

this Court to review the legality of that Order in making its determination on Lamar's Petition for a Writ of Certiorari.

ARGUMENT

The Commission's Memorandum Opinion and Order of May 21, 1971, Deprives Lamar of Its Property in Contravention of Law.

Lamar's Petition for a Writ of Certiorari details its contentions as to how the Commission's Memorandum Opinion and Order of September 8, 1970, unlawfully deprives Lamar of its statutory rights and its property in contravention of Section 307(d) of the Communications Act of 1934, as amended, 47 U.S.C. §307(d), and Section 9(b) of the Administrative Procedure Act, 5 U.S.C. §558 (c). Those arguments need not be here repeated.

The Commission's Memorandum Opinion and Order, released May 21, 1971, seeks to implement and enforce the Commission's Order of September 8, 1970, and is thus an integral part of the action of the Commission here on review upon certiorari. However, the Commission's latest Order goes beyond the September 8, 1970, Order to require that Lamar not only cease operating WLBT as of a given date but that, further, it be *required* to operate the station, using its own capital, its own equipment, and its own staff, with the profits earned by Lamar from such operation to be turned over to CII to be distributed by it to third parties. The Order contemplates no recompense to Lamar for this period of forced operation for CII's benefit, even though the period of such operation is to occur while the issue of CII's legal right to such operation and the profits therefrom is still pending upon certiorari in this Court under an effective stay of mandate.

Lamar submits that while the Commission, if not prevented by judicial stay, may have the power, subject to judicial review of its exercise, either (1) to require Lamar to take the station off the air completely; or (2) to authorize Lamar to operate pending certiorari with the profits properly impounded and held in escrow until this Court acts on the petition for writ of certiorari, the Commission cannot, as its May 21, 1971 Order requires, force Lamar to operate WLBT, pending certiorari, as the agent of and for the benefit of CII, without reimbursement, with the profits to be paid to CII and distributed by it to third parties. To do so is to deprive Lamar of its lawfully earned profits with no recompense whatsoever for the efforts expended and expense incurred by Lamar in operating the station for the period involved.

The unlawful deprivation of Lamar's rights and property as a result of the May 21, 1971 Order is underscored by the fact that CII has no assets whatsoever, except for borrowed working capital from the United Methodist Church. As a non-profit corporation, CII has no invested equity capital. It must rely entirely for the operation of WLBT upon prospective but speculative profits from the operation and upon a line of credit the terms of which (1) require the pledge of all accounts receivable as collateral; and (2) affirmatively prevent CII from using the proceeds of the loan to pay off prior indebtedness or for collateral for other indebtedness.

Thus, if Lamar pays over its profits to CII pending certiorari, without recompense, to be forthwith distributed by CII to third parties, as required by the Commission's latest Order, and if this Court thereafter grants certiorari and reverses on the merits, Lamar's profits will be forever lost. The most that Lamar will have is a worthless action for damages against a penniless and defunct

non-profit corporation. Further, even if this Court denies certiorari or grants certiorari but affirms on the merits, since the Commission's Order contemplates no reimbursement by CII to Lamar for the period of forced operation, in the form of lease rental or otherwise, Lamar will nevertheless suffer an unlawful deprivation of its property. The damage, in this event, would be measured by the reimbursement to which Lamar was lawfully entitled for the use of its capital, staff and equipment but which it was denied.

Lamar's Petition for a Writ of Certiorari urges that the September 8, 1970, Order of the Commission deprives Lamar of its statutory right to operate WLBT(TV) as a "hold-over" licensee under Section 307(d) of the Communications Act of 1934, as amended, 47 U.S.C. §307(d), and Section 9(b) of the Administrative Procedure Act, 5 U.S.C. §558(c). The Commission's Order of May 21, 1971, clearly compounds the injury. Indeed, even if this Court should deem the Commission's Order of September 8, 1970, to be a lawful exercise of the Commission's power, the Commission's Order of May 21, 1971, affirmatively directing Lamar to work for CII without recompense from April 17, 1971, to June 14, 1971, while the issue as to the legality of the grant of operating authority to CII is *sub judice* upon petition for writ of certiorari in this Court, constitutes an unlawful deprivation of Lamar's rights.

CONCLUSION

For the reasons above stated, it is respectfully requested that this Court review the Commission's Order of May 21, 1971, in reaching its determination on Lamar's Petition for a Writ of Certiorari.

Respectfully submitted,

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